

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
	)	
Petitioner-Cross Respondent,	)	
	)	
v.	)	Case Nos. 15-1182 (L)
	)	15-1281
PESSOA CONSTRUCTION COMPANY,	)	
	)	
	)	
<u>Respondent-Cross Petitioner.</u>	)	

**PETITIONER PESSOA CONSTRUCTION COMPANY’S  
RESPONSE *IN OPPOSITION* TO MOTION OF THE NATIONAL LABOR  
RELATIONS BOARD TO STRIKE PESSOA’S REPLY TO THE BOARD’S  
RESPONSE TO PESSOA’S 28(j) LETTER, OR IN THE ALTERNATIVE  
TO CONSIDER THE BOARD’S SURREPLY**

Pessoa Construction Company (“Pessoa”), through counsel, responds in opposition to the Board’s Motion as follows:

1. The National Labor Relations Board’s (“NLRB”) moved to strike Pessoa’s Rule 28(j) reply arguing it is not supported.
2. The Motion was filed in violation of Local Rule 27(a) that requires the moving party to ascertain the position of opposing counsel and certify the same to the Court. The purpose is to narrow the issues:

In cases where all parties are represented by counsel, all motions shall contain a statement by counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion. The statement shall indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition.

The NLRB's Motion should be denied for violating this Rule.

3. It has been the practice of the parties in this case to discuss all motions in advance and to indicate same to the Court. They have done so to date by professionally cooperating to move this case forward. The abandonment of the practice is not explained by the NLRB when this opposed motion may have been averted.

4. The NLRB's sur-response cites no case where a Reply is precluded when the Response raises new matter not encompassed in the opening letter.

5. The NLRB does not dispute it raised new matter in its Response to the Supplemental Authority, where the Third Circuit's decision in *Resch, et al. v. Krapf's Coaches, Inc.*, No. 14-3679 (3d Cir. 2015), confirmed the Motor Carrier Act does not authorize overtime for commercial motor vehicle (CMV) drivers. Rather, the NLRB Response letter disputes this Court's jurisdiction over the overtime issue under 29 U.S.C. §160(e) where the NLRB granted overtime to the CMV driver involved in this case over Pessoa's objection.

6. Pessoa's Reply was submitted to show the Court that Pessoa presented the zero overtime hours objection to the Board at JA 111-12 (in one of three factual scenarios from the ALJ's opinion), which supports Pessoa's \$24,054 backpay figure.

7. The NLRB's proposed sur-response points out that Pessoa's chart at

JA 111-12 reflects overtime pay for Membrino after 2010. Not all of Pessoa's work or Membrino's interim jobs starting in April 2010 was for work covered by the Motor Carrier Act.

Respectfully submitted,

/s/ Michael E. Avakian

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Dated: July 20, 2015

Attorney for Petitioner

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PESSOA CONSTRUCTION	)	
COMPANY,	)	
	)	
<u>Respondent-Cross Petitioner.</u>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Petitioner's Response was served on the attorneys of record registered with the Court's CM/ECF system, on this the 20th day of July 2015:

/s/ Michael E. Avakian  
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